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PROPERTY PLANNING AND THE SEARCH FOR A COMPREHENSIVE HOUSING POLICY—THE VIEW FROM *MOUNT LAUREL*

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It is generally conceded that the nation is suffering from a chronic housing shortage and that the situation is worsening.[1] Land prices, as well as the escalating cost of labor and material, are driving the initial cost of home ownership and, correspondingly, of rental accommodations beyond the reach of an ever greater percentage of the population.[2] Simultaneously, the housing stock of our major cities is being depleted via the ravages of time, owner neglect, and affirmative abuse on the part of some occupants. What new housing is being built is to be found on the periphery of the avalanche of development proceeding out in concentric circles from major urban centers. Here, single-family units, detached or otherwise, are the rule, and multifamily and rental accommodations are the exception.[3] The physical makeup of such new communities, the necessity for commutation to centers of employment, and

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1 *See* Mallach, *Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation*, 6 RUTGERS • CAMDEN L.J. 653 (1975) [hereinafter cited as Mallach]; Pearlman & Benton, *State Homeownership Programs*, 3 BNA HOUSING & DEV. REP. 199 (1975).

2 *See* 3 BNA HOUSING & DEV. REP. 195 (1975), wherein it is reported that the median price of single-family units sold during April 1975 was $39,500, an increase of $3800 over the median price for the previous year. Further, the Federal Home Loan Bank Board has stated that even the $2000 tax credit on the purchase of a new home has not effectively spurred sales. *Id.* at 193. *See also* Rose, *Exclusionary Zoning and Managed Growth: Some Unresolved Issues*, 6 RUTGERS • CAMDEN L.J. 689, 694 (1975) [hereinafter cited as Rose].

3 *See* 3 BNA HOUSING & DEV. REP. 195 (1975). Of the 1.126 million housing starts in May 1975, 886,000 were single-family units, 53,000 were two-to-four-unit buildings, and 187,000 were buildings with five or more units. Further, of the 909,000 building permits issued in the same month, 653,000 were for single-family units, 54,000 were for two-to-four-unit buildings, and 202,000 were for buildings with five or more units. Finally, of the 1.173 million housing completions in April 1975, single-family units accounted for 724,000 completions, two-to-four-unit buildings accounted for 69,000 completions, and buildings with five or more units accounted for the remaining 380,000 completions. Multifamily housing starts, *i.e.*, buildings with more than five units, had decreased 58% from May 1974, whereas single-family housing starts had decreased only 4.2%. Permits issued for multifamily housing had decreased 50% from the previous year, but single-family unit permits decreased only 5.3%. *Id.*

the real property tax picture make it all but impossible for young married couples and those living on fixed incomes to find suitable shelter within these new suburbs. In the older suburbs that were developed after World War II, the first generation of occupants is reaching the stage in life when it no longer needs, and in many instances can no longer afford, large detached homes, and yet, it can find no suitable substitute. It would be safe to conclude that there is too little housing available or under construction and that the shelter that is being built is too expensive or otherwise unsuited to the needs of a large segment of the population.[4]

This background explains why much will be written in praise of the far-reaching opinion of the Supreme Court of New Jersey in *NAACP v. Township of Mount Laurel*.[5] There the court took an expansive view of both the concept of "general welfare" and the objectives of the zoning process.[6] In so doing, it concluded that, when formulating land use controls, municipalities must take into account the amount and types of housing needed by the population of the region.[7] Accordingly, where local regulations frustrate development of needed housing facilities, they will be struck down as unauthorized by the police power and violative of the equal protection clause of the state constitution.[8] Moreover, the justification that this evil was either un-

[4] *See* notes 2-3 and accompanying text *supra*.

[5] 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed*, 44 U.S.L.W. 3198 (U.S. Oct. 6, 1975) (No. 75-38).

[6] *Id.* at 178-79, 336 A.2d at 727-28. The traditional view of the objectives of zoning ordinances is noted in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). There, the United States Supreme Court determined that a municipality has a right to control and regulate the development of privately owned land for the benefit of the community. Such authority, premised upon a delegation of the state's police power, will permit a municipality to take reasonable action in furtherance of public safety, health, and general welfare. *See also* Nectow v. City of Cambridge, 277 U.S. 183 (1928); Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

[7] 67 N.J. at 188-90, 336 A.2d at 732-34. This expansive view of the zoning process has been advocated by some commentators to offset the inherently discriminatory features of exclusionary zoning ordinances. *See, e.g.*, Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969) [hereinafter cited as Sager]. *See also* Note, *The Equal Protection Clause and Exclusionary Zoning After* Valtierra *and* Dandridge, 81 YALE L.J. 61 (1971), wherein the author, summarizing the views of those opposed to exclusionary zoning, states that

> exclusionary zoning statutes must be measured by a compelling state interest rather than a rationality standard because such statutes discriminate against two classes entitled to special judicial protection, racial minorities and the poor, and deny citizens their "fundamental interest" in housing. Opponents of exclusionary zoning contend, in this connection, that the compelling state interest test applies when the *effect* of a zoning statute is to discriminate against a racial minority or the poor, although the legislators who passed the zoning law may not have had a discriminatory *motive* or *purpose*.

Id. at 67 (footnote omitted) (emphasis in original).

[8] 67 N.J. at 174-75, 336 A.2d at 725, *quoting* N.J. CONST. art. I, ¶ 1. Notwithstanding the recognized need for adequate housing, the United States Supreme Court, in Lindsey

intended or merely the byproduct of a good faith attempt to keep real estate taxes within bounds will not alter the result.[9] In the pages that follow, the strong and weak points of the *Mount Laurel* decision are analyzed and some suggestions for the formulation of an affirmative housing program are offered.

THE *Mount Laurel* CONTROVERSY

The Township of Mount Laurel is comprised of 22 square miles of land (approximately 14,000 acres) located in southern New Jersey, in close proximity to Philadelphia. As of 1950, the population of Mount Laurel was 2817, and agriculture was the Township's principal land use. Several pockets of poverty existed, with low income families living in dilapidated housing. At the time of the *Mount Laurel* litigation, only 300 of these substandard units remained. After 1950, with the advent of improved highways, residential development and some commerce and industry arrived on the scene. By 1960, the population had practically doubled, and by 1970, it swelled to 11,221.[10] The new residents were drawn from outside the Township and were employed in the surrounding region. The court described Mount Laurel as "now definitely a part of the outer ring of the South Jersey metropolitan area, which area we define as those portions of Camden, Burlington and Gloucester Counties within a semicircle having a radius of 20 miles or so from the heart of Camden city."[11] At the present time, approximately 65 percent of the land in the Township is either devoted to agriculture or otherwise undeveloped.

As originally enacted, the zoning ordinance in question contained no provision for multifamily or attached housing. The municipality's three residential zones called for single-family, detached houses built on lots ranging in area from ¼ to ½ acre.[12] A later amendment created

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v. Normet, 405 U.S. 56 (1972), refused to grant such need the status of a fundamental interest protected by the equal protection clause of the United States Constitution. In speaking for the majority, Justice White stated:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . .

Id. at 74.

9 67 N.J. at 188, 336 A.2d at 732.

10 *Id.* at 161, 336 A.2d at 718.

11 *Id.* at 162, 336 A.2d at 718.

12 Previous cases holding minimum lot size ordinances unconstitutional typically involved larger parcels. *See, e.g.*, Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 320 A.2d 223 (L. Div. 1974) (one- and two-acre zoning); *In re* Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) (two- and three-acre lots); *In re* Girsch, 437 Pa. 237, 263 A.2d 395 (1970) (two-acre zoning); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (four-acre lots).

a "cluster" zone,[13] wherein the minimum lot size could be reduced by one-half, provided the developer dedicated from 15 to 25 percent of his total acreage to public use. Even within the cluster zone, however, single-family detached housing remained the only permissible use. The combination of minimum frontage and building size requirements worked to exclude low-cost housing. In 1971, the average dwelling in the Township was priced at $32,500.[14]

Pursuant to enabling legislation enacted in 1967,[15] Mount Laurel adopted supplemental zoning provisions which authorized creation of planned unit developments (PUD). While the PUD ordinance[16] did permit multifamily housing, it was not designed to accommodate and in fact was decidedly beyond the economic means of low and moderate income families, particularly those with young children. In order to control the occupancy in such developments, the PUD amendment severely limited the number of multibedroom apartments and required that leases limit the number of school-aged children, that developers covenant to pay tuition costs in the event more than a fixed number of children reside in the multifamily units, and that amenities, such as central air conditioning, be furnished in order to push rent and sales prices to high levels. Even though the Township's PUD ordinance was subsequently repealed, it was considered by the court because of the possibility of its reenactment and its part in the pattern of exclusionary legislation.

Another relevant amendment to the ordinance created a Planned Adult Retirement Community (PARC) zone[17] which sanctioned multifamily housing for adults over 52 years of age.[18] The court found, however, that the numerous development requirements outlined in the ordinance made it clear that the plan was not designed for, and would be well beyond the financial means of, retirees with low and moderate incomes. In fact, whenever substandard accommodations were vacated, the Township moved to eliminate them by forbidding further occupancy. All nongovernmental attempts to improve conditions were effec-

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13 *See* 67 N.J. at 165, 336 A.2d at 720.

14 *Id.* at 164, 336 A.2d at 719.

15 *See* The Municipal Planned Unit Development Act, N.J. STAT. ANN. §§ 40:55-54 *et seq.* (Supp. 1975). This legislation was designed to organize New Jersey's urban expansion and to meet the demand for adequate housing facilities.

16 *See* 67 N.J. at 166-67, 336 A.2d at 721.

17 *See id.* at 168-69, 336 A.2d at 722.

18 This type of restriction has been declared unconstitutional in New Jersey. *See* Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 125 N.J. Super. 376, 311 A.2d 187 (App. Div. 1973); Shepard v. Woodland Township Comm. & Plan. Bd., 128 N.J. Super. 379, 320 A.2d 191 (Ch. 1974).

tively thwarted. In neither the original nor the amended ordinance was any provision made for trailers or mobile homes, perhaps the most economical form of housing in today's market. Finally, in order to attract favorable "ratables"[19] and to freeze development of a large percentage of its land, the Township "overzoned" for industry. In excess of 29 percent of the Township was so zoned, although only 2½ percent of this land was actually used for industry and there was no anticipated influx of potential plant site users.

The plaintiffs challenging the zoning ordinance fell into four distinct categories including present Township residents residing in substandard housing, former residents displaced by the unavailability of suitable housing within the Township, prospective low and moderate income residents, and three organizations representing racial minorities. For purposes of this litigation, the "low income" segment of the population was defined as persons or families who, by virtue of their limited income, were eligible for rent supplements or public housing units. The "moderate income" group was defined as persons or families eligible for occupancy in housing units receiving subsidies under the National Housing Act or other similar federal housing programs.[20] Having concluded that the present residents had standing, the trial court found it unnecessary to pass upon the status of the other plaintiffs.[21] The New Jersey Supreme Court, while expressing no opinion as to the standing of the organizations, also recognized the right of former and prospective residents to be heard on the issues before the court.[22]

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19 A "good ratable" is defined as a piece of real estate which yields to a governmental subdivision a substantially high real estate tax revenue in relation to the expenditures for services which must be provided for such property. *See* NAACP v. Township of Mount Laurel, 67 N.J. 151, 171, 336 A.2d 713, 723 (1975).

20 National Housing Act, §§ 235, 236, 12 U.S.C. §§ 1715Z, 1715Z-1 (Supp. III, 1973). The low and moderate income categories were defined in dollar terms in an earlier suit involving different parties but similar issues in a lower court. In Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 320 A.2d 223 (L. Div. 1974), the court, allowing its figures to vary according to family size, used "low income" to refer to those persons earning less than $7000 a year and "moderate income" to those earning between $7000 and $12,000 per year.

21 *See* NAACP v. Township of Mount Laurel, 119 N.J. Super. 164, 290 A.2d 465 (L. Div. 1972). After the opinion in the *Mount Laurel* case was handed down by the New Jersey Supreme Court, a parallel case reached the United States Supreme Court. In Warth v. Seldin, 95 S. Ct. 2197 (1975), the Court found that all of the various types of plaintiffs lacked standing to sue in the federal courts. Although a state's highest court may grant standing to anyone it wishes within its own forum, it does not necessarily follow that those same persons or groups will have standing in the federal courts.

22 On the issue of standing the court stated:

> The township originally challenged plaintiffs' standing to bring this action. The trial court properly held . . . that the resident plaintiffs had adequate standing to ground the entire action and found it unnecessary to pass on that of the other plaintiffs. The issue has not been raised on appeal. We merely add that both

Faced with the unbroken pattern of exclusion of low and moderate income families, coupled with the planned elimination of all existing substandard housing facilities, the court unanimously concluded that the zoning ordinance was invalid.[23] While the majority found the defects so grave as to be violative of the State's constitution,[24] one of the concurring justices was content to rest the result on the zoning enabling statute and its underlying policy.[25] The entire court, however, was in agreement as to the nature and extent of the defects in the ordinance. The majority position is summarized in the following passage from the opinion:

> We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.[26]

The principal justification offered by the municipality was the present and future economic well-being of its own inhabitants.[27] More

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categories of nonresident individuals likewise have standing. . . . No opinion is expressed as to the standing of the organizations.

67 N.J. at 159 n.3, 336 A.2d at 717 n.3 (citations omitted).

[23] *Id.* at 191, 336 A.2d at 734.

[24] The court stated: "our opinion is that Mount Laurel's zoning ordinance is presumptively contrary to the general welfare and outside the intended scope of the zoning power in the particulars mentioned." *Id.* at 185, 336 A.2d at 730.

[25] *Id.* at 193, 336 A.2d at 735 (Mountain, J., concurring). Judge Pashman also wrote a concurring opinion in which he stated:

> I differ from the majority only in that I would have the Court go farther and faster in its implementation of the principles announced today. . . . [T]he Court [should] not restrict itself to the facts of this particular case but, rather, lay down broad guidelines for judicial review of municipal zoning decisions which implicate these abuses.

Id. at 194-95, 336 A.2d at 736 (citation omitted) (Pashman, J., concurring). Judge Pashman then proceeded to outline such guidelines:

> [T]he trial court ought to proceed in four steps:
> (1) identify the relevant region;
> (2) determine the present and future housing needs of the region;
> (3) allocate these needs among the various municipalities in the region; and
> (4) shape a suitable remedial order.

Id. at 215-16, 336 A.2d 747 (footnotes omitted).

[26] *Id.* at 174, 336 A.2d at 724-25 (footnote omitted).

[27] This line of reasoning is supported by cases holding that the general welfare properly promoted by an ordinance is that of the residents of the municipality which institutes the ordinance. *See generally* Nectow v. City of Cambridge, 277 U.S. 183 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Sager, *supra* note 7.

specifically, the Township argued that by reason of New Jersey's tax structure — one which finances municipal, governmental, and educational costs out of the revenue produced by local real property taxes — every municipality should be free to allow only such uses as will have a favorable impact upon the local tax picture. The State Legislature's refusal to enact an income tax had forced local governments to rely heavily upon property taxes to support education and municipal services and has heretofore justified the scramble for good ratables,[28] and indirectly, the practice of exclusionary zoning. While not ruling out the right of a municipality to seek good ratables, the court concluded that economic considerations could not justify total exclusion of housing accommodations for low and middle income groups. Aesthetic and environmental interests comprised the second justification offered by the Township. Less restricted growth, it claimed, would prove too burdensome to its sewage disposal system and water supply,[29] thus endangering the health, safety, and welfare of the community. While recognizing these concerns as legitimate, the court indicated that these goals could be secured through alternative means, including builder exactions or installations financed by way of special assessments.[30]

Central to the court's thinking was the notion that housing is an essential of human existence and that the needs of the region's population for various kinds of housing must be considered[31] by every municipality, irrespective of the makeup of existing residents. In the words of the court:

> It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, includ-

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28 *See* note 19 *supra.*

29 *See* Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

30 Where a new housing development will increase the need for public services such as sewerage, the municipality may require the builder to pay for the initial installation. Of course, this cost is passed on to the initial purchaser.

31 *But cf.* Lindsey v. Normet, 405 U.S. 56 (1972) (housing quality not recognized as fundamental interest).

> ing, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.[32]

The court stopped short of finding that local governments must actively undertake a public housing program for the disadvantaged. It also refrained from supervising the process of amending the Mount Laurel ordinance to bring it in line with the court's opinion. Instead, it ordered the Township to reform its zoning ordinance within 90 days, relying upon the parties to advise the court — via renewed litigation — as to any disobeyance of the order.[33]

THE AFTERMATH OF *Mount Laurel*

The opinion under discussion represents a significant step forward in the housing field. As in the desegregation,[34] reapportionment,[35] and

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[32] 67 N.J. at 179-80, 336 A.2d at 727-28. The court amplified the "presumptive obligation" of the municipality in the following passage of its opinion:

> We have spoken of this obligation of such municipalities as "presumptive." The term has two aspects, procedural and substantive. Procedurally, we think the basic importance of appropriate housing for all dictates that, when it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, a facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action. . . . The substantive aspect of "presumptive" relates to the specifics, on the one hand, of what municipal land use regulation provisions, or the absence thereof, will evidence invalidity and shift the burden of proof and, on the other hand, of what bases and considerations will carry the municipality's burden and sustain what it has done or failed to do. Both kinds of specifics may well vary between municipalities according to peculiar circumstances.

Id. at 180-81, 336 A.2d at 728 (citation omitted).

[33] *Id.* at 192, 336 A.2d at 734. The court discussed, but did not definitively resolve, the difficulty a municipality might have in ascertaining both regional housing needs and its share of the regional burden. The court commented that:

> Here we have already defined the region at present as "those portions of Camden, Burlington and Gloucester Counties within a semicircle having a radius of 20 miles or so from the heart of Camden City." The concept of "fair share" is coming into more general use and, through the expertise of the municipal planning adviser, the county planning boards and the state planning agency, a reasonable figure for Mount Laurel can be determined, which can then be translated to the allocation of sufficient land therefore on the zoning map. . . . We may add that we think that, in arriving at such a determination, the type of information and estimates, which the trial judge . . . directed the township to compile and furnish to him, concerning the housing needs of persons of low and moderate income now or formerly residing in the township in substandard dwellings and those presently employed or reasonably expected to be employed therein, will be pertinent.

Id. at 190, 336 A.2d at 733 (footnote omitted) (citations omitted). The court did note that the needs of commuters from out-of-State would have to be considered. In a footnote, some of the factors which might be taken into account in arriving at a "fair share" formula were discussed. *Id.* at 215-16 n.17, 336 A.2d at 747 n.17 (Pashman, J., concurring).

[34] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Brown v. Board of Educ., 349 U.S. 294 (1955).

[35] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

public school funding areas,[36] the courts have taken the lead in directing that necessary, albeit politically sensitive, steps be taken in the public interest. State legislatures, composed as they are of individuals elected on a local basis, have a built-in resistance to steps such as these that override jealously guarded local values. Stated somewhat differently, the jurist's constituency is the public at large, whereas that of the legislator is his geographically circumscribed electorate. Accordingly, decisions such as *Mount Laurel* accomplish what might otherwise take decades to be realized through legislation.[37] Nevertheless, it must be recognized that the judicial system has its limitations in the housing field. As the justices themselves stressed, courts cannot promulgate zoning ordinances, and more precisely, they cannot manufacture housing to meet the obvious public need. It is also true that, in the last analysis, courts must look to legislative guidelines in passing upon such matters as minimum lot size, excessive building permit fees, time control zoning ordinances, builder exactions, and other emerging land use controls.[38] Much needless and repetitive litigation — the cost of which adds to the end product — could be avoided if the legislatures ended their 50-year slumber and fashioned a comprehensive housing policy. It would appear that a sound legislative housing program must start with a clear picture of certain fundamental facts and objectives. A basic list of these items would include the following:

(1) *Quantity and cost.* Housing is needed in large quantities and must be manufactured at far less than prevailing market prices.[39] Accordingly, the major thrust of any housing program should be the production of the maximum amount of shelter at the lowest conceivable cost. Any and all other objectives, whether legislatively or judicially recognized, must be carefully scrutinized in order to determine the extent to which they frustrate realization of this overall objective. While it is customary to regard all construction expenses, builder exactions for example, as part of the cost of doing business, all such expenditures are immediately passed along to the ultimate purchaser of the housing unit and should be evaluated in light of this fact.[40] Moreover, excessive demands made upon the developer, whether in terms of cash, land, or donated public facilities, may represent another

[36] *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

[37] *See* notes 34-36 *supra.*

[38] *See* Rose, note 2 *supra*, wherein the author states: "Perhaps the lesson of *Mount Laurel* is that the courts alone cannot resolve these questions. Eventually there may emerge a democratic consensus through which the legislature may provide more definitive answers." *Id.* at 726.

[39] *See* notes 2-3 *supra.*

[40] *See* note 30 and accompanying text *supra.*

form of discrimination by the established residents against potential newcomers.

There is a constant undercurrent of conflict, often left unarticulated, between, on the one hand, the desire of the legislative and judicial branches to allow communities to regulate the sequence, type, and cost of growth, and, on the other hand, the equally commendable goal of fostering housing for all. Thus, it is conceivable that the highest court of any given state could hand down a decision such as *Golden v. Planning Board*[41] sustaining time control zoning, and, on the same day, hand down a decision like *Mount Laurel*. In rendering the two opinions the court might not be aware of, nor deeply concerned with, the fact that the two decisions point in different directions from an economic point of view. One slows down the housing process and adds to the cost of the end product; the other cuts redtape and mandates that municipalities do all that they can to facilitate, if not sponsor, housing for the economically disadvantaged. Part of the problem, of course, lies in the fact that we are accustomed to thinking in terms of the "haves" and the "have-nots" as two mutually exclusive groups that encompass the entire public to be served. When housing problems are viewed in this way there is a tendency to overlook the housing difficulties of those who are not on welfare but who still cannot afford decent shelter in today's market.

(2) *Society has a vital stake in how and where housing is built.* Once land is developed, its characteristics in a real sense are determined for several generations to come. All too often, attention is focused upon the position of the seller of raw land and that of the developer, with little or no thought being given to the long term impact of the projected housing development upon its future inhabitants. In the post-World War II era, this approach led to an unlimited expanse of "suburban sprawl," with bedroom communities stretching out in all directions from centers of employment. The failure of local governments to insist upon the creation of well-balanced communities has led directly

41 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972). Zoning ordinances were passed by the Town of Ramapo to effectuate an 18-year master plan for development. According to the plan, the granting of a permit for the development of a subdivision was predicated upon the level of municipal services then available. A prospective developer, however, could accelerate the subdivision approval process by agreeing to provide the municipal services necessary to reach the required level. The goal was to create timed growth. The New York Court of Appeals upheld the constitutionality of the ordinance. For a thorough discussion of *Golden*, see Morris, *"Zoning Imagination"—Dimensional Zoning*, 46 ST. JOHN'S L. REV. 679, 680 (1972); Note, Golden v. Planning Board: *Time Phased Development Control Through Zoning Standards*, 38 ALBANY L. REV. 142 (1973); and Note, *A Zoning Program for Phased Growth: Ramapo Township's Time Controls on Residential Development*, 47 N.Y.U.L. REV. 723 (1972).

to the social and economic waste inherent in having millions of persons commute great distances each day to and from work and has accelerated the search for good ratables. The pollution and energy price tag of this mode of development is just coming to be recognized. In a similar vein, with the advent of mammoth increases in utility rates, the much publicized "all-electric home" has turned into a nightmare for home buyers.[42] This, in turn, has spotlighted the necessity for sound insulation, just as the heightening concern for water purity has cast serious doubt over the advisability of utilizing septic tanks in large-scale housing developments as a substitute for sewage and waste disposal systems.[43] Accordingly, it is becoming increasingly clear that society must have an input in determining the location and composition of large-scale developments.

(3) *Affirmative steps must be taken to identify the types of housing needed, to encourage its production, and to safeguard such housing from local self-interest measures.* As the *Mount Laurel* opinion makes clear, housing needs must be approached on a regional basis.[44] However, local goverments have neither the financial resources nor the expertise — much less the inclination — to make the in-depth studies that a regional approach requires. Accordingly, the underlying research must, of necessity, be carried out at successively higher levels of government. It must also be recognized that, however hospitable the climate of local opinion may be, low-cost and high density housing will not be built if the same cannot be held or marketed at a respectable profit. Therefore, serious thought should be given to the number and types of incentives that ought to be offered, including income and real estate tax breaks, to attract private capital.[45] If it becomes clear to developers that entry into the low-cost and high density markets is financially rewarding, society will have moved a long way towards reaching its desired goal.

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42 *See* N.Y. Times, June 9, 1974, § 1, at 43, col. 1, wherein it is stated that people unfortunate enough to own all-electric homes were paying approximately double their normal electric bills due to Con Edison's fuel adjustment rate. One person was now paying $295 a month for electricity. *See also id.*, Mar. 8, 1974, at 12, col. 1.

43 The critical shortage of natural gas in certain parts of the country may lead to a situation in which whole neighborhoods heated by gas are simply without fuel to burn. The point to be noted is that even routine housing components may be affected by foreign affairs and governmental priorities.

44 For a discussion of regional planning, see Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PA. L. REV. 515 (1957).

45 *See, e.g.*, Treas. Reg. §§ 1.167(j)-(k) (1972) (guidelines on housing tax shelter under the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (codified in scattered sections of 26 U.S.C.)). For an illustration of the type of incentive programs which could be instituted, see Felix & McIntyre, *Tax Shelters in FHA Housing Programs*, 2 P-H TAX IDEAS ¶ 27,501 (1972). *See also* 3 BNA HOUSING & DEV. REP. 168 (1975).

(4) *Experimentation with various forms of building and land arrangements must proceed apace.* It is generally agreed that the traditional tract home will remain beyond the reach of the bottom 30 percent of the economic ladder for the indefinite future.[46] Accordingly, experimentation should be carried out with various forms of mass-produced housing, including mobile homes[47] and prefabricated structures, in order to reduce the initial cost of acquiring housing and the subsequent costs of maintaining it. "Operation Breakthrough,"[48] sponsored by the Department of Housing and Urban Development some years ago, represented a first step in the right direction. Cluster housing, planned unit development, and similar land use measures should be fostered in order to hold down land and construction costs. Significantly, the court refused to pass on the validity of PUD ordinances in the *Mount Laurel* opinion.

If the principles enunciated in *Mount Laurel* lead to greater use of mass produced housing, the end result need not be a decline in

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[46] Steeping inflation is now pushing the cost of new homes up at a rate of more than 9% per year. Boston Sunday Herald, Sept. 7, 1975, § 3 (Real Estate-Classified), at 41, col. 3. Figures prepared by the Mortgage Bankers Association of America reveal the effect inflation has had on home prices:

	First Qtr. 1970	First Qtr. 1975	(Percent) Change 1970-1975
Median Price New Homes Sold (Average Jan., Feb., Mar.)	$23,900	$36,500	52.7
Average Price New Homes Sold (Actually Sold)	$27,00[*sic*]	$40,600	50.4
(1967 "Standard" House)	$28,600	$41,800	46.2
New Homes Sales Price Index (1967 = 100)	116.4	170.1	46.1
Existing Home Sales Price (Median)	$22,600	$33,820	49.2
Department of Commerce Composite Construction Costs Index (1967 = 100) (Average Jan., Feb., Mar.)	117.5	184.4	56.9
Rent Index (1967 = 100)	108.4	134.9	24.5

Danziger, *Recreational Land Demand Expected to Strengthen*, *id.* Aug. 31, 1975, § 4 (Real Estate-Classified), at 1, col. 1. *See also* Mallach, *supra* note 1, at 657 n.12, wherein the author discusses the cost of undeveloped land in various New Jersey counties.

[47] *See* Note, *Toward an Equitable and Workable Program of Mobile Home Taxation*, 71 YALE L.J. 702 (1962).

[48] "Operation Breakthrough" was designed to provide mass production of low income housing through the cooperative efforts of public officials, builders, and unions. According to the plan, several prototypes were to be built, the most successful to be mass produced and erected across the nation. N.Y. Times, May 9, 1969, at 1, col. 5.

aesthetics, water pollution control, sanitary conditions, and the like. The trailer park syndrome of the World War II era is not a necessary corollary of more efficient production and delivery systems. Local governments could still insist upon adequate standards of performance, provided the standards are not a disguised method of excluding the economically disadvantaged.

(5) *An in-depth study of the residential construction industry should be made.* The housing industry, ranking closely behind agriculture and automobile manufacturing, is a mainstay of the nation's economy, especially when one considers its necessary tie-in with the appliance and home furnishing industries. The fragile nature of the industry is documented by the significant number of experienced developers that flounder each year. An offshoot of a study of the industry might be renewed efforts to develop nationwide building code standards and to otherwise facilitate production and delivery of housing components. The risks taken by prospective housing developers should be quantified and made more, not less, predictable in order to foster the production of housing. Thus, for example, a manageable insurance program should be fashioned to back up express warranties on new construction. Where local opposition needlessly delays a sound housing project, all foreseeable items of damage, including the cost of carrying the land, mortgage interest on the construction loan, and increased construction costs due to inflation, should be recoverable by the developer. Another possibility would be the establishment of a summary proceeding to determine such cases promptly. If a disgruntled property owner wished to mount an appeal or to litigate matters that have already been litigated by others, full damages could be awarded the developer. Again, drawing a parallel to the criminal process, it might prove advisable to vest exclusive authority to halt housing developments in one or more governmental agencies subject to appropriate safeguards. Where local officials abuse legislative or administrative machinery in an effort to delay or frustrate well-planned developments, the courts should not permit such conduct to be shielded behind cliches such as "nonreviewable legislative motive."[49]

(6) *Different approaches should be formulated for municipalities that are in various stages of the housing cycle.* A well-balanced program

[49] In one pending suit, damages are being sought against local officials for allegedly acting improperly. The suit involves a $5.5 million claim brought in a federal district court against present and former officials of Townsend, Massachusetts. The plaintiffs allege that the defendants conspired to use their positions on various town boards to prevent plaintiffs from obtaining the permits necessary to subdivide their land. *See* Rohan & Berger, 3 CONDOMINIUM REP., Sept. 1975, at 8.

should include aid to inner cities to prevent deterioration of their housing stock, aid to local governments that are in immediate danger of being overrun by developers, and aid to rural areas that seek to plan for their orderly future development. The necessity for such a multifaceted approach was clearly outlined by the court in *Mount Laurel.*

(7) *An in-depth study of rent control should be undertaken.* Rental properties in urban centers are essential for low income families. Until a suitable alternative form of shelter is provided by the operation of free market forces (or by the government as the landlord of last resort) some form of rent control is essential. It is becoming increasingly clear, however, that existing rent control programs tend to destroy the housing they are intended to stabilize. By the same token, blanket prohibitions against conversion of apartments to cooperative or condominium status frustrate another promising avenue of housing reform. Both the rent control and the conversion process could be vastly improved and made to work, especially if combined, where appropriate, with government aid to low income families. The government's housing function has traditionally been viewed as an offshoot of the welfare program and nothing more. The housing function should be regarded as a separate and distinct obligation of society, especially if the bottom 30 percent of the economic ladder stand little or no chance of ever earning sufficient income to afford acceptable housing.

(8) *The structure and function of the real property tax must be thoroughly reconsidered.* Widespread dissatisfaction with the theory and practice of real property tax assessment is becoming evident on a nationwide basis. The function of this tax must be reassessed, particularly in light of recent court rulings concerned with the role this form of taxation plays in fostering unequal educational opportunities in the public schools.[50] Again, it would be a futile gesture to make home ownership available to low and moderate income families who are then unable to cope financially with an inordinate real estate levy. A softening of the real estate burden may ultimately be necessary, with the lost revenue being made up by way of an increase in the graduated income tax.

CONCLUSION

The *Mount Laurel* opinion raises many more problems than it solves. There is the question of defining the applicable region, the enigma of what to do with the small or fully established community,

[50] *See, e.g.,* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied,* 414 U.S. 976 (1973).

and the ultimate question of just what the municipality's affirmative obligation is with respect to the creation of housing for the economically disadvantaged. There is also the question of whether the lofty principles enunciated in the opinion lend themselves to application in concrete circumstances wherein the municipality's behavior pattern is not as obvious as it was in *Mount Laurel.* Recognizing these problems, it is still safe to conclude that the court opened a new era of judicial review in land use matters by the very scope of its decision and the role played by socio-economic factors in its rationale. Like United States Supreme Court opinions in such areas as the "one-man-one-vote" principle, desegregation, and criminal procedure, the opinion may not prove easy of application in any subsequent case. Nevertheless, it sets the tone for what type of action is to be expected of local officials in land use matters and provides the lower courts with the tools for reworking the entire area. This, in the final analysis, may prove to be the lasting contribution of the court that issued the *Mount Laurel* opinion.